East Sussex County Council v Sussex Central Area Justices

Court
Queen's Bench Division (Administrative Court)

Judgment Date
16 January 2019

CO/3982/2018

High Court of Justice Queen's Bench Division Administrative Court

[2019] EWHC 164 (Admin), 2019 WL 00237607

Before: Mrs Justice Lang

Wednesday, 16 January 2019

In the matter of the education act 1996

In the matter of the criminal procedure rules part 35

In the matter of a case stated by sussex central area justices

Anonymisation Applies

Representation

Mr M Downs (instructed by Orbis Law/East Sussex County Council Legal Services) appeared on behalf of the Appellant. The Respondent was not present and was not represented.

Judgment

Mrs justice lang:

1. This is an appeal by way of case stated brought by East Sussex County Council (hereinafter "the Council") against the decision of the Justices in the Sussex Central Area sitting in Brighton on 5 July 2018 in which they acquitted the defendants, "P" and "S", for an offence contrary to section 444(1) of the Education Act 1996 ("EA 1996"). The Council is the local education authority for the area. It laid informations against the defendants that they had failed to ensure the regular attendance at the school of their son, who is only to be identified by the letter "E" for the purpose of these proceedings. His date of birth is 24 March 2012 and he is 6 years of age.

The statutory framework

2. Section 444 of the EA 1996 provides, so far as is material:

"(1) If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence.

(1A) If in the circumstances mentioned in subsection (1) the parent knows that his child is failing to attend regularly at the school and fails to cause him to do so, he is guilty of an offence.

(1B) It is a defence for a person charged with an offence under subsection (1A) to prove that he had a reasonable justification for his failure to cause the child to attend regularly at the school.

(2) Subsections (2A) to (6) below apply in proceedings for an offence under this section in respect of a child who is not a boarder at the school at which he is a registered pupil.

(2A) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school at any time if the parent proves that at that time the child was prevented from attending by reason of sickness or any unavoidable cause.

(3) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school—

(a) with leave […]

(8) A person guilty of an offence under subsection (1) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(8A) A person guilty of an offence under subsection (1A) is liable on summary conviction—

(a) to a fine not exceeding level 4 on the standard scale, or

(b) to imprisonment for a term not exceeding three months [51 weeks] or both.

(8B) If, on the trial of an offence under subsection (1A), the court finds the defendant not guilty of that offence but is satisfied that he is guilty of an offence under subsection (1), the court may find him guilty of that offence.

(9) In this section 'leave', in relation to a school, means leave granted by any person authorised to do so by the governing body or proprietor of the school."

3. The section therefore creates two offences. The defendants in this case were only charged under subsection (1), not subsection (1A). The defendants successfully relied on the defence in subsection (2A), namely that their son was prevented from attending school by reason of sickness.

4. In *Barnfather v Islington Education Authority & Anor [2003] EWHC 418 (Admin); [2003] 1WLR 2318* , the Divisional Court confirmed that section 444(1) EA 1996 created a strict liability offence and that Article 6(2) of the European Convention on Human Rights was not engaged. It is worth mentioning that section 444 was amended after the material dates in that case, with effect from 1 September 1999, so non-attendance by reason of the child's ill-health thereafter became a defence

which the parent had to prove under subsection (2A), rather than an ingredient of the offence that the prosecution had to prove under subsection (3).

5. Section 444 EA 1996 was considered by the Supreme Court in *Isle of Wight Council v Platt [2017] UKSC 28; [2017] 1 WLR 1441* , which held that the phrase "fails to attend regularly" in subsection (1) meant failed to attend in accordance with the rules prescribed by the school, not failed to attend sufficiently frequently. That point was not in issue in this case. In her judgment at [20], Baroness Hale summarised the statutory provisions, materially for this case that in subsection (2A) the circumstances in which a child's absence is not to be treated as a failure to attend regularly were limited to sickness or other unavoidable cause where the "burden lies on the parent". At [40], Baroness Hale referred to the reasons why unauthorised non-attendance at school was undesirable.

The question for the opinion of the court

6. In the case stated, the Justices set out the question for the opinion of the High Court, which was as follows:

> "Were we reasonably entitled to reach our finding that [P] and [S] had discharged their burden under section 444 (2A) of the Education Act 1996 based on the evidence presented despite the absence of written medical evidence covering all periods of their child's non-attendance at school?"

The Council's grounds of appeal

7. The Council submitted that the Justices ought not to have found that the parents had made out their defence that E was prevented from attending school by reason of sickness without more medical evidence, particularly bearing in mind the significant number of absences. Between 9 October 2017 and 2 March 2018 there were 168 periods of attendance. The school authorised absence for 38 periods due to illness. However, there were a further 72 unauthorised absences, amounting to 43 per cent of the total, which the parents claimed were due to illness. It was submitted that the acquittals were perverse.

The Justices' decision

8. The Justices heard oral evidence from Sonia Cole of the Council and from the parents, and also considered documentary evidence adduced. They made the following findings of fact. At paragraph 2, they said:

> "We heard the said information on 5 July 2018. We heard live evidence from Sonia Cole for the prosecution and heard the evidence of [P] and [S] for the defence and as a result we found the following facts:
>
> (a) [E] had been referred to the service in October 2017. Mrs Cole, a behaviour and attendance practitioner, took over from her colleague Matthew Hatch in relation to the issues of non-attendance of [E] in January 2018.
>
> (b) Prior to Mrs Cole's involvement, [P] had attended a meeting in October 2017 with Mr Hatch and a support plan had been implemented. [E's] attendance at that point was 33 per cent. The next review took place on 15 November 2017 when [E's] attendance rate was 66 per cent. The next review took place on 12 December 2017 when [E's] attendance rate was 46 per cent. Subsequent

to the last review, letters were sent to the parents requesting contact but no contact was made. The letters were not provided to the court.

(c) Mrs Cole invited [P] and [S] to join her at the [school] on 9 January 2018. [E's] attendance rate was around 46 to 50 per cent at the time. [P] called on 19 January 2018 and asked to reschedule the meeting for 24 January 2018. This was agreed. [P] failed to advise his wife of the new date. He left education-related meetings to his wife. [P] and [S] did not receive the letter detailing the revised date. Neither [P] nor [S] attended the meeting.

(d) A prosecution notice was sent to [P] and [S] on 25 January 2018. No other discussion took place between and Education Welfare Officer and [P] and [S]. Two weeks later legal intervention was started.

(e) Whenever medical evidence had been provided by the parents the school had authorised the absence. This is indicated by a '1' on the exhibit marked as SC/0.

(f) Letters were provided from the parents to the school from the [surgery] where E is registered as a patient. These were dated 20 October 2017, 14 December 2017, 31 January 2018 and 4 June 2018. There was also a consultation document dated 4 December 2017 from [the doctor] (see exhibits SC/02, SC/03, SC/04, SC/05, SC/06).

(g) Mrs Cole had no personal knowledge of E's medical condition and was reliant on information provided to her from the school and the medical letters (exhibits SC/02 to SC/06).

(h) [E] is six years of age and the youngest of four children. Two of his siblings also attend [the school] with 100 per cent school attendance. One of his siblings has been off school for two years but there was no further information given by any party why this was the case.

(i) [E] has had medical difficulties since birth resulting from a deep infection in his left lung which has moved to his right lung. As a result, he suffered from asthma from a young age and faces regular problems with his breathing. On his last visit to the doctors he was rushed to hospital. He has been on steroids, asthma pumps and nebulisers throughout his life. He has also been given penicillin regularly. He can be sick through the night and is really ill every month. A paediatrician's appointment has been arranged recently in order to provide a current diagnosis as to his condition.

(j) It takes two to three weeks to get an appointment at the doctor's surgery that [E] is registered at unless it's an emergency situation. As a result, there were times when [E] was not taken to the doctors when unwell. It cost £20 to get evidence from the doctor for each time that an illness is recorded with the doctor. They will not always provide a letter. The doctors have, however, provided a letter which was given to the school to explain that [E's] medical condition is a long-term thing.

(k) [E] has medication at the school consisting of two inhaler pumps to control his asthma (one brown, one blue) and steroids. He has to take eight steroid pills before he goes to school. The school contacts a parent to give medication to [E] if he needs any whilst at school. The school will not administer any medication themselves. If [E] has become unwell during the school day, then the parents have been contacted to take him home. This has happened on a number of occasions.

(l) [P] had asked the head teacher for a home tutor and said that other members of his family in Sussex got such help. They said they were part of a travelling community.

(m) At the request of the education service [S] provided a letter from the surgery as to dates she had visited the doctor with [E].

(n) [S] spoke mainly to …the school SENCO attendance officer about E's non-attendance."

9. The Justices set out the competing submissions of the parties as follows:

> "(3) It was contended by the appellant that the defendants had not discharged their burden of proof as to [E's] sickness by the evidence they had provided to the court. Reference is made to section 444(1) of the Education Act 1996 and the statutory defences available under the Act. Reference is made to the case of *Isle of Wight v Platt [2017] 1 WLR 1441* and that it considered the use of the word 'regularly' but no specific parts of the judgment were referred to and the case law was not provided to the court. As the defendants were unrepresented no closing speech was made.
>
> (4) It was contended by [P] and [S] that they had always sent their son [E] to school when he was fit to attend and that on every other occasion that was shown as unauthorised by the school records this was due to him being sick."

10. At the hearing before me, the Council submitted that the copies of the case law were provided to the court, but as the legal test is not in dispute I do not consider that this is relevant to the matters I have to decide. At the hearing before me, the Council objected to the fact that they were not given an opportunity to make a closing speech, but the justices acted in accordance with standard procedure and practice in not inviting the Council to make a closing speech as the defendants were unrepresented. I see no irregularity in that.

11. The Justices set out the advice which they received from their legal adviser, which I consider was correct in law:

> "(5) It was accepted by [P] and [S] that [E] had failed to attend school on the dates specified on the exhibit (SC/01). However, under the provisions of section 444(2A) of the Education Act 1996 a child shall not be taken to have failed to attend regularly at the school by reason of their absence from the school at any time if we were satisfied that their parent had proved that at the time the child was prevented from attending by reason of sickness. In those circumstances, it was for [P] and [S] to satisfy the court on the balance of probabilities that this was the case in order for us to acquit."

12. The Justices then went on to correctly direct themselves, at paragraph 6, in the following terms:

> "(6) In reaching our decision we reminded ourselves that we had to decide in the light of our findings of fact whether on the balance of probabilities [E] had been prevented from attending school on each of the occasions shown on exhibit SC/01 due to sickness."

13. The Justices then set out, at paragraph 7, their findings and grounds for decision:

> "(7) We found that on a number of occasions [E's] absences were supported by medical evidence authorised by the school. In relation to the other absences that were not authorised by the local authority, we found [P] and [S's] evidence credible and reliable when they gave evidence that [E] suffered from chronic asthma and that all the occasions of unauthorised absence were because of illness. We accepted their evidence as credible that it was not possible to get medical evidence every time [E] was absent, either for practical or cost reasons. We believe that evidence. We found on the balance of probabilities that [E] was unwell on the dates in question and that this prevented him from attending school and we consequently found both defendants not guilty. We found [P] and [S] not guilty of the offence that between 9 October 2017 and 2 March 2018 they failed to ensure regular attendance at the [school] of [E] date of birth 24 March 2012 who is a child of compulsory school age."

Conclusions

14. The basis of an appeal by way of case stated pursuant to section 111 of the Magistrates' Courts Act 1980 is an error of law which can, of course, include perversity and reaching a decision wholly unsupported by evidence, as well as misdirection as to the law. But it is important to bear in mind that the case stated procedure is not an appeal by way of rehearing, in which the evidence is reassessed by the appellate court. At the hearing before me, the Council expressed its disagreement with the Justices' assessment of the evidence and their findings of fact in considerable detail. The Council also referred to many points which only related to the background history and/or were of secondary importance and could not reasonably bear on the issues which the court had to decide.

15. In my judgment, the Justices were entitled to make their findings (which I have set out above) on the evidence which was before them. They were entitled to rely on their assessment of the oral evidence of P and S, as well as such documentary evidence as was available. Although I appreciate that the Council disagrees strongly with the Justices' findings and conclusions, the Justices' decision that P and S established the defence in subsection (2A) cannot be characterised as perverse, unsupported by evidence or otherwise wrong in law.

16. For those reasons, this appeal must be dismissed.

MR DOWNS: My Lady, I was just going to say if the court might want to consider as far as the description of Child E as also any restriction about the date of birth, only because modern thinking is sometimes it is best if dates of birth are not included in judgments. But I am in your Ladyship's—-

MRS JUSTICE LANG: I do consider that the date of birth is integral to the case.

MR DOWNS: I do understand in education cases.

MRS JUSTICE LANG: I did have a slight concern about including the parents' surnames, as presumably that means that anyone who knows the parents will be able to identify the child. Sometimes in cases involving children the parents are anonymised as well.

MR DOWNS: Yes. Totally content with that on the basis that it would tend to identify Child E.

MRS JUSTICE LANG: So shall we just – I can amend the judgment so that they are referred to by their initials.

MR DOWNS: Well, or possibly just a random initial like J. Just off the top of my head, a random initial.

MRS JUSTICE LANG: I mean, they have got to be referred to separately because there are two defendants.

MR DOWNS: Yes. J and K?

MRS JUSTICE LANG: What about just the initial of their first names?

MR DOWNS: Yes.

MRS JUSTICE LANG: So omit [the surname].

MR DOWNS: Yes, my Lady.

MRS JUSTICE LANG: Now, I assume that P and S have not incurred any costs in relation to this appeal because they have not attended or submitted any documents?

MR DOWNS: My Lady, yes.

MRS JUSTICE LANG: So no order for costs.

MR DOWNS: Yes, my Lady.